Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Sections of the	)	
Cable Television Consumer Protection	)	MM Docket No. 92-266
and Competition Act of 1992	)	
	)	MM Docket No. 93-215
Rate Regulation	)	

OPPOSITION OF THE NATIONAL CABLE TELEVISION ASSOCIATION, INC. TO PETITIONS FOR RECONSIDERATION

The National Cable Television Association, Inc. ("NCTA"), by its attorneys and pursuant to Section 1.429(f) of the FCC's rules, hereby submits its Opposition to the Petitions for Reconsideration filed by the Georgia Municipal Association ("GMA") and the New Jersey Board of Public Utilities ("NJ Board").[1] GMA and the NJ Board both seek changes in the Commission's rules, released on June 5, 1995, governing the rates that small systems owned by small cable companies may charge their subscribers.[2]

The Commission should deny the Petitions.[3] Since the inception of rate regulation under the 1992 Cable Act, the Commission has struggled to devise a

---

1 60 Fed. Reg. 47365 (Sept. 12, 1995).

2 Sixth Report and Order and Eleventh Order on Reconsideration, MM Docket No. 92-266 and MM Docket No. 93-215 (rel. June 5, 1995) (hereinafter "Eleventh Recon. Order").

3 The NJ Board's request for a stay of para. 74 of the Commission's Eleventh Recon. Order should also be denied. The NJ Board's speculative claim that application of the new rules to pending proceedings will allow "at least one operator...to have an unfair advantage" with respect to rate-setting and that the application of the rules will "irreparably harm subscribers" is hardly the showing of injury necessary to support a

regulatory approach that provides small cable companies a measure of relief from the burdens of complying with the Commission's complex rate regulations. The approach finally adopted by the Commission correctly recognizes the high cost of capital incurred by small cable operators, their lack of financial and structural resources to cope with extensive regulation, and the difficult challenges faced by these operators as they seek to attract the capital needed to rebuild their networks.[4]

The new rules strike an appropriate balance between the rights of small cable companies to charge rates reflecting their costs, and the rights of local franchising authorities to review those costs, without either side being forced to undergo expensive and time-consuming cost-of-service proceedings. These new rules thus serve the public interest by decreasing the administrative and substantive burdens on small cable operators, franchising authorities, and the Commission. Moreover, the Commission has implemented the rules in a manner that will serve to minimize subscriber confusion by lessening the need for frequent rate changes. Neither GMA's nor the New Jersey Board's Petition present evidence justifying a change in these rules.

---

stay of the rules generally. NJ Board Motion For Stay at 1-2. The NJ Board, moreover, incorrectly assumes that small cable systems will not be harmed and the public interest will be served by the stay. Id. at 2. Grant of the stay requested will serve only to perpetuate the regulatory uncertainty and burdens which have placed a chokehold on small cable systems seeking to compete and to upgrade their networks. Upon completion of the first proceeding, the system would be forced to initiate yet another proceeding to justify its rates under the new rate rules, which take into account the particular characteristics of small systems. This is precisely the type of onerous administrative burden and scenario that will cause subscriber confusion that the Commission sought to avoid in adopting its new rule. The NJ Board's speculative claims of irreparable injury, coupled with its failure to present a basis for believing that the NJ Board will prevail on the merits on reconsideration, justify a denial of the motion for stay.

[4] Eleventh Recon. Order at para. 25.

ARGUMENT

I. The Commission Should Not Modify Its Small System Rules

The Cable Act of 1992 directs that in implementing the Act's rate regulation provisions, the Commission "[s]eek to reduce the administrative burdens on subscribers, cable operators, franchising authorities, and the Commission." Section 623(b)(2)(a). In an effort to achieve this goal, the Commission adopted rules that reduce the costs of compliance with the rate regulation provisions by small systems in several ways.

The Commission acted in recognition that "[s]maller cable companies are unduly burdened by the current scheme of rate regulation in two ways. First, the comments suggest that our rate rules do not adequately take into account the higher costs of doing business, and particularly the higher costs of capital, faced by smaller companies. Second, many operators claim that our rules place an inordinate hardship upon them in terms of labor and other resources that must be devoted to ensuring compliance."[5] The new rules address these concerns by easing the regulatory burdens imposed on these companies, yet still allowing for franchising authority oversight of rates. They also correct certain unreasonable presumptions that had failed to properly account for the costs of small systems providing cable service.

Rather than requiring submission of an 8 page form and providing information on 32 cost categories in order to justify rates based on costs, the new rules allow small operators to submit a one page form and to apply a relatively simple formula (Form 1230). In order to document these costs, a franchising authority may ask the operator to provide only existing, relevant materials.[6] And

---

[5] Id. at para. 55.

[6] Id. at para. 65.

to ensure that protracted rate proceedings are not necessary, the Commission established certain presumptions based on an evaluation of small system cost showings. If, upon calculation of a per-channel rate using the new small system formula, an operator proposes to charge a rate of no more than $1.24 per channel, that rate is presumed reasonable, and a franchising authority seeking to challenge that rate has the burden of showing that the rate is not properly calculated. If that formula generates a rate in excess of $1.24 per channel, the burden shifts to the operator to demonstrate the reasonableness of its rate.[7]

The Petitions do not dispute the core underpinnings of the new rules. Instead, they challenge two discrete aspects. GMA argues that the $1.24 per channel rate should not be presumed reasonable. The NJ Board argues that the new rules should not apply to proceedings that were not final at the time of the rules' adoption. The Petitions in effect seek to convince the Commission that administrative burdens -- including lengthy document requests, more bureaucratic review, and interminable delay -- are critical to proper evaluation of small cable system rates. The Commission, however, has correctly concluded that relief from precisely these types of burdens is necessary. Small systems should be able to do business without being subjected to the onerous and complex rate regulation scheme. Nothing presented by the franchising authorities changes this sound conclusion.

---

[7] Id. at para. 54.

A. GMA Has Not Shown That The FCC's Calculation Of A Per-Channel Rate Is Unreasonable

GMA attempts to attack the new rules by arguing that the presumptively reasonable per channel rate should be reduced to some unspecified level.[8] GMA's Petition provides no support for the Commission adopting any other per-channel rate. But GMA questions the accuracy of the small cable operator cost-of-service filings upon which the presumption was derived.

GMA's Petition, however, is devoid of any evidence that $1.24 is not the appropriate per-channel rate. The Commission established this rate by examining actual small operator cost-of-service filings and obtaining the average per-channel rate, to which it added one standard deviation.[9] GMA does not question the method by which the FCC derived this rate. Instead, GMA merely speculates that the cost-of-service showings examined by the FCC in deriving the $1.24 per channel rate were somehow faulty, and that the "FCC has assumed that the permitted rates shown on the face of the Form 1220 are justified."[10] But GMA has not examined these filings, and its Petition presents no reason to believe that the filings were inaccurate or, even if they were, that the FCC staff reviewing the 35 cost-of-service filings blindly accepted erroneous filings.[11]

---

8 GMA Petition at 1.

9 Eleventh Recon. Order at para. 68.

10 GMA baldly claims that "if the FCC were to review these forms, it would probably find that corrections should be made to the operators' calculations in a large percentage of cases." GMA Petition at 2.

11 GMA's vague complaint about the Bureau's review is hardly buttressed by its claim that in prior FCC cost-of-service cases, the Bureau determined "[t]hat the permitted rates as calculated by the operators were not correct." GMA Petition at 2. In fact, in the three cases cited by GMA allegedly in support of this argument, the Bureau reached the opposite conclusion -- it found the rates being charged by the operator were in fact reasonable. See In re Cable TV of Georgia, L.P., Memorandum Opinion and Order, DA 94-1148, released November 9, 1994 at para. 2; In re Mid-Atlantic CATV Limited

GMA also suggests that these cost-of-service filings should be discounted because they might have included elements -- such as intangible assets -- that may have been disallowed under the Commission's interim cost-of-service rules. The Commission, however, fully explained why the interim cost-of-service presumptions were inapplicable in the case of small systems.[12] It recognized that:

> the presumptions and restrictions applicable to standard cost-of-service proceedings shall not apply .... Having isolated a category of systems for whom our standard rules need to be relaxed due to the particular characteristics of those systems, we seek to ensure that those systems will be permitted to establish rates in accordance with such characteristics, rather than in accordance with the characteristics of cable systems generally.[13]

GMA's Petition completely ignores the sound reasoning behind the Commission's determination to abandon its interim cost-of-service presumptions here.

In short, GMA fails to provide any evidence that undermines the Commission's determination that a $1.24 per-channel rate is presumptively reasonable. Nor does GMA provide any basis for revisiting the Commission's decision to adopt its new small system rules. The rules adopted alleviate the regulatory burdens imposed on small systems and local franchising authorities, allow these systems to recover their operating costs and a reasonable return on investment, permit local franchising authorities to review rates and to make

---

Partnership, Memorandum Opinion and Order, DA 94-1147, released November 9, 1994 at para. 2; In re United Video Cablevision, Inc., Memorandum Opinion and Order, DA 94-1144, released November 9, 1994 at para. 2.

[12] In any event, NCTA believes that those interim cost-of-service presumptions regarding intangible assets, start up losses, and rate of return are invalid in the case of all cable systems. See NCTA Comments in MM Docket No, 93-215 (filed July 1, 1994). The Commission has still not issued final cost-of service rules.

[13] Eleventh Recon. Order at para. 59.

reasonable requests for information, and are consistent with the congressional goal of reducing regulatory burdens and compliance costs for small systems. GMA's Petition offers no reason to recast these rules. Consequently, its Petition should be denied.

B. The New Jersey Board's Petition Should Be Denied

The New Jersey Board of Public Utilities limits its reconsideration petition to the question of the applicability of the new rules to matters pending before franchising authorities as of June 5, 1995. The NJ Board complains that its "[a]bility to ascertain the operator's true costs will be severely constrained" if an operator's rate is below the $1.24 per channel level. And it argues that "[i]t is particularly unfair to subscribers and the Board to apply such a ruling to pending cases after substantial resources have already been devoted to the matters."[14] While NCTA expresses no opinion about the merits of the specific rate case about which the Board focuses its Petition, a review of some of the facts behind that proceeding starkly demonstrate why the Commission's decision in the small system proceeding was the correct one.

According to the Opposition to the Petition for Reconsideration filed by Service Electric Cable TV of Hunterdon, Inc. ("SECH"),[15] SECH operates a 3000 subscriber systems in New Jersey. Since its initial form was filed, "[t]he Office of Cable Television of the Board of Public Utilities and the Division of Ratepayer Advocate have asked more than 100 discovery requests that required more than 450 pages of detailed responses from SECH. Discovery requests were made over a

---

[14] NJ Board at 6.

[15] Filed Aug. 17, 1995.

period of four months."[16] A rate decision still was not forthcoming at the time the Commission adopted its new rules.[17] And the system still did not know -- over a year after its initial forms were filed -- whether its rates were permissible.

The history of the New Jersey proceeding speaks volumes about why new rules are warranted, and why the Commission was right in applying its new rules to on-going proceedings. Otherwise, small cable companies would continue to be subject to onerous document requests and prolonged uncertainty as proceedings dragged on under rules that the Commission has determined do not serve the public interest. Moreover, upon conclusion of these proceedings, small systems would be forced to undergo yet another rate review in order to charge different rates that are permissible under the new rules.[18] Subscribers, meanwhile, would be faced with confusing and frequent rate changes.

---

[16] Id. at 2.

[17] Id.

[18] See Separate Statement of Commissioner Andrew Barrett at 1 - 2 ("Though the Commission or local franchising authorities could determine under the previous rules that a reduction in the rate is warranted, in the end, the system would be entitled to increase its rate on a prospective basis. The effect on consumers of lowering and then raising rates would undoubtedly be confusion. In addition, I question whether it makes sense on the one hand for the Commission to recognize the need for meaningful relief for these systems and then on the other to apply rules that fail to satisfy that need.")

CONCLUSION

For the foregoing reasons, the Commission should deny the Petitions to Deny and should reaffirm its small system rules.

Respectfully submitted,

Daniel L. Brenner
Diane B. Burstein
Lisa Schoenthaler
1724 Massachusetts Avenue, NW
Washington, DC 20036
(202)775-3664

Counsel for the National Cable
Television Association, Inc.

September 27, 1995

CERTIFICATE OF SERVICE

I, Staci M. Pittman, do hereby certify that on this 27th day of September, 1995, copies of the foregoing **"Opposition of the National Cable Television Association to Petitions for Reconsideration"** were delivered by first-class, postage pre-paid mail upon the attached list:

Staci M. Pittman

Staci M. Pittman

Deborah T. Poritz
Attorney General of New Jersey
State of New Jersey
Department of Law and Public Safety
Division of Law
124 Halsey Street
P. O. Box 45029
Newark, NJ 07101

Thomas C. Kelly, Esq.
175 Fairfield Avenue, Unit 1C
P. O. Box 1558
West Caldwell, NJ 07006

Donald W. Schanding
Rate Analyst
Georgia Municipal Association
201 Pryor Street, SW
Atlanta, GA 30303